# Telecommunication Facility Siting:

# Creative Settlement Strategies for Land Use Development Litigation

May 12, 2006

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## INTRODUCTION

In a Memorandum Opinion & Order[1] adopted June 9, 1994, the Federal Communications Commission ("FCC") developed rules designed, among other purposes, to "foster rapid deployment of a competitive market that will provide consumers with access to a diverse array of high-quality, low-cost PCS services and products on a wide area basis" (¶ 158).

In 1996, Congress enacted the Federal Telecommunications Act, in relevant part, 47 U.S.C. § 332 (the "TCA"), the purpose of which the Supreme Court has recently described in City of Rancho Palos Verdes, Cal. v. Abrams, 125 S.Ct. 1453, 1455-56 (2005), as follows:

> Congress enacted the Telecommunications Act of 1996 (TCA), 110 Stat. 56, to promote competition and higher quality in American telecommunications services and to "encourage the rapid deployment of new telecommunications technologies." … One of the means by which it sought to accomplish these goals was reduction of the impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers. To this end, the TCA amended the Communications Act of 1934, 48 Stat. 1064, to include § 332(c)(7), which imposes specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of such facilities, 110 Stat. 151, codified at 47 U.S.C. § 332(c)(7).

As the Supreme Court indicated in Rancho Palos Verdes, under § 332(c)(7), local governments may not:

- "unreasonably discriminate among providers of functionally equivalent services,"§ 332(c)(7)(B)(i)(I),
- take actions that "prohibit or have the effect of prohibiting the provision of personal wireless services,"§ 332(c)(7)(B)(i)(II), or
- limit the placement of wireless facilities "on the basis of the environmental effects of radio frequency emissions,"§ 332(c)(7)(B)(iv).

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1 *See* Memorandum Opinion and Order, FCC 94-144, June 13, 1994, *summarized* 59 FR 32820 (June 24, 1994); Erratum, GEN Docket No. 90-314, Mimeo Number 44006 (released July 22, 1994).

Section 332(c)(7) further requires that localities making zoning decisions that involve the placement of wireless communications facilities:

- must act on requests for authorization to locate wireless facilities "within a reasonable period of time,"§ 332(c)(7)(B)(ii), and

- must, in the event of a denial, issue a decision "in writing and supported by substantial evidence contained in a written record,"§ 332(c)(7)(B)(iii).

Lastly, § 332(c)(7)(B)(v) provides that:

> "Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction."

Lower federal courts have focused on the TCA as a compromise between two competing goals: "to facilitate nationally the growth of wireless telephone service and to maintain substantial local control over siting of towers." Town of Amherst, NH v. Omnipoint Communications Enterprises, Inc., 173 F.3d 9, 13 (1st Cir. 1999). The TCA "does not federalize telecommunications land use law." Southwestern Bell Mobile Systems, Inc., d/b/a Cellular One, v. Todd, 244 F.3d 51, 57 (1st Cir. 2001), citing Roberts v. Southwestern Bell Mobile Sys., Inc., 429 Mass. 478, 709 N.E.2d 798, 802 (1999). However, the courts routinely recognize that the TCA limits the ability of state and local authority to apply zoning regulations to wireless communication facilities. See, e.g. Southwestern Bell Mobile Systems, Inc., d/b/a Cellular One, v. Todd, 244 F.3d 51, 57 (1st Cir. 2001) (While "Congress sought to encourage the expansion of personal wireless services," local governments retain control "'over decisions regarding the placement, construction, and modification of personal wireless service facilities' ... *subject to several substantive and procedural limitations that 'subject [local governments] to an outer limit' upon their ability to regulate personal wireless services land use issue*s.") (emphasis

added), citing Town of Amherst, N.H. v. Omnipoint Communications Enterprises, Inc., 173 F.3d 9, 15 (1st Cir.1999); Telecorp Realty, LLC v. Town of Edgartown, 81 F.Supp.2d 257, 259 (D. Mass. 2000) (47 U.S.C. § 332(c)(7)'s limitations on local zoning authority).

This memorandum (a) briefly examines the competitive landscape underlying the wireless industry as it has evolved over time; (b) summarizes judicial determinations pertaining to the TCA's four main requirements in cases from the First Circuit Court of Appeals and the United States District Court for the District of Massachusetts; (c) illustrates some of the key issues facing carriers and municipalities as they continue to interact over this important and increasingly vital communications medium, and (d) recommends creative settlement strategies to resolve siting controversies.

## IMPORTANT DEFINITIONS

The TCA provides that "personal wireless services" are "commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services." 47 U.S.C. § 332(c)(7)(C)(i).[2] Mobile service is defined as "a radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves… ."[3] "[R]adio communication" or "communication by radio" are in turn defined as "the transmission by radio of **writing, signs, signals, pictures, and sounds of all**

2 Commercial Mobile Service is defined as "any mobile service (as defined in section 153 of this title) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission. 47 U.S.C § 332(d)(1).

3 Mobile service is defined as "a radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves, and includes (A) both one-way and two-way radio communication services, (B) a mobile service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations (whether licensed on an individual, cooperative, or multiple basis) for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation, and (C) any service for which a license is required in a personal communications service established pursuant to the proceeding entitled "Amendment to the Commission's Rules to Establish New Personal Communications Services" (GEN Docket No. 90-314; ET Docket No. 92-100), or any successor proceeding." 47 U.S.C. § 153(27).

**kinds**, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." 47 U.S.C. 153(33) (emphasis added).

As the definitions make clear, the term "personal wireless services" encompasses a broad spectrum of communications, beyond just voice transmission including without limitation data, text messaging, electronic mail, and internet access. This is consistent with the FCC's Memorandum Opinion & Order which provides that the FCC's Final Rule is designed to "ensure that the American public benefits from the new mobile digital voice and *data services*." (¶ 158) (emphasis added).

## THE EVOLVING COMPETITIVE LANDSCAPE

Initially, competing FCC-Licensed Carriers began to build facilities which provided voice and short messaging services for mobile in-vehicle coverage along major highways and in metropolitan areas. Over time, to satisfy regulatory requirements, to meet skyrocketing consumer demand for increased availability, quality voice and data services (including such advanced services as text messaging, electronic mail, sending and receiving pictures, and internet browsing), and to satisfy changing customer usage patterns, carriers have redoubled and intensified their competitive efforts to construct state-of-the-art wireless networks to deliver these needed services throughout their licensed territories. In this same period, subscribers have moved away from wireless communications as a supplement to traditional wire-line communications, and they are increasingly using wireless communications as their primary mode of communication for voice and data transmissions[4] in their homes and offices.[5]

4 *See* Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, WT Docket No. 02-379 (Released July 14, 2003), p. 49 (hereinafter the "FCC Report")("Once solely a business tool, wireless phones are now a mass-market consumer device… There is much evidence, however, that consumers are substituting wireless service for traditional wireline communications."). (internal citations omitted).

This increasing use of mobile devices indoors has presented new challenges for network design and construction. The signal strength that is appropriate to service an outdoor area or to provide coverage in a vehicle is often insufficient to penetrate the layers of walls and office infrastructure where subscribers are now using their wireless devices. As a result, carriers need to construct and optimize their networks to provide appropriate indoor and in-vehicle coverage to a constantly evolving customer base. Not only does this help address significant gaps in coverage, but also it helps carriers retain existing subscribers and attract new subscribers. In other words, FCC-Licensed Carriers must provide the necessary coverage and signal strength to meet and exceed subscriber expectations, and to provide competitive, high-quality voice and data services in their licensed service areas.

As subscriber usage patterns have shifted to substitute wireless for traditional wire-line communications, placing these two types of services in direct competition,[6] wireless carriers must provide services to compete not only with each other but also with traditional wire-line communications. As a consequence, a determining qualitative factor of customer satisfaction[7] will increasingly move away from simply the quality of voice transmission to the quality of both voice[8] and data transmission.[9]

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5 As of 2003, "One analyst estimates that wireless has now displaced about 30 percent of total wireline minutes". *Id.* at 50. (internal citations omitted). That percentage is undoubtedly higher today.

6 *Id*.

7 The FCC Report provides that "[c]onsistent with findings in previous reports, customers indicated cost and network quality as the main reason for changing provider." FCC Report at 35. (internal citations omitted). The FCC Report also states that "[a]nalysts have noted that a negative impression of a carrier's service quality can be detrimental to its market share," and that "[e]vidence from the CMRS [commercial mobile radio services] marketplace shows that carriers compete in terms of service quality." *Id.* at 69, 41-42.

8 Evaluation of voice call quality includes such factors as the ability to connect the call on the first attempt, the ability to carry the call to completion, and the ability of the participants to have their voices transmitted clearly.

9 Evaluation of data transmission includes such factors as the ability to connect to the service on the first

For data transmission, the competition with wire-line providers includes not only traditional dial-up services using so-called "plain old telephone service" ("POTS") lines, but also includes without limitation broadband providers such as Digital Subscriber Lines ("DSL"), T-1 lines, cable modems, and Integrated Services Digital Network ("ISDN"). These enhanced wire-line services represent a fast-growing segment of the communications industry and provide much greater transfer speeds than the traditional POTS lines. It is these providers with whom wireless carriers increasingly must keep pace.

Enhanced signal strength is one key to providing competitive data transfer rates: in simplified terms, the greater the signal strength, the greater the potential data transfer rate. Building a network to provide suitable signal strength is therefore one key to competing with both wire-line and wireless communications carriers for both voice and data services. It is this competition between and among the wireless carriers and wire-line carriers that creates benefits for consumers, the residents and businesses of the municipalities served. The beneficial effects of competition underlie various FCC's regulations and specific construction requirements. *See* 47 C.F.R.§ 24.203.[10]

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attempt, the ability to complete the transfer of data, and the speed at which the data transfer occurs ("data transfer rate").

10 The FCC's Final Rule was designed to:

- "facilitate implementation of a broad range of new wireless services" (¶ Summary);
- "foster rapid creation of a competitive market to deliver these new mobile digital voice and data services to the American public" (¶ 3);
- "better achieve what had been and continue to be [the FCC's] four primary goals in this proceeding: competitive delivery, a diverse array of services, rapid deployment and wider area coverage" (¶ 4);
- further congressional objectives including "promoting economic growth and competition, enhancing widespread access to telecommunication service offerings and ensuring the PCS licenses are disseminated to a wide variety of applicants" (¶ 4);
- "enable PCS providers to compete effectively with each other and with other wireless providers so that the American public can enjoy the greatest benefit from the delivery of these new services" (¶ 5);
- ensure "that firms will compete not only on price, but also on quality and the types of new

As carriers compete to provide these services to an increasingly knowledgeable, sophisticated, and demanding customer base, land use issues arise in the communities that they serve. This has led to a vast array of judicial decisions, much of it favorable to the FCC-licensed carriers.

## TCA JUDICIAL DECISIONS

### The TCA Provides One-Way Protection for FCC-Licensed Carriers

Each of the TCA's substantive and procedural limitations is designed to protect the prospective providers of telecommunications services from overzealous or parochial regulation at the local level. See Southwestern Bell Mobile Systems, Inc., d/b/a Cellular One, v. Todd, 244 F.3d 51 (1st Cir. 2001). The TCA "provide[s] for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies to all Americans." Omnipoint Communications MB Operations, LLC, v. Town of Lincoln, 107 F. Supp.2d 108, 116-120 (D. Mass. 2000) (citations and internal quotations omitted).

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products and services they offer" (¶ 6);

- promote "rapid deployment [which] is important so that consumers do not have to wait for the benefits of the new services" (¶ 7);
- "ensure that PCS service is made available to as many communities as possible and that the spectrum is used effectively" (¶ 107);
- "increase the viability and value of some Broadband licenses, especially those in less densely populated service areas" (¶ 108);
- "ensure efficient spectrum utilization and promote significant Nationwide coverage without imposing substantial cost penalties on licensees that serve less densely populated areas" (¶ 109);
- "foster provision of PCS services and ... promote diversity in their provision" (¶ 111);
- "improve PCS licensee's ability to configure their systems to best serve the needs of their customers and to compete with other mobile services such as Cellular in wide area SMR" (¶ 117);
- "promote the goal of service to less populated areas" (¶ 118);
- "ensure balanced base-to-mobile and mobile-to-base communications" (¶ 119);
- "ensure that the American public benefits from the new mobile digital voice and data services" (¶ 158); and
- "foster rapid development of a competitive market that will provide consumers with access to a diverse array of high quality, low cost PCS services and products" (¶ 158).

The TCA's private right of action, 47 U.S.C. § 332(c)(7)(B)(v), provides federally licensed telecommunication carriers (and persons seeking to construct towers or facilities for use by such carriers) with the right to seek expedited judicial review of final state or local denials that are inconsistent with the TCA's provisions. Federal jurisdiction is consistently invoked by these facility proponents to challenge state and local decisions that obstruct construction of wireless communication facilities.[11]

There is nothing in § 332(c)(7)(B)(v) (or any other provision of the TCA) evincing a congressional intent to grant disgruntled citizens who oppose such facilities a federal private right of action to challenge a decision of a local Board *approving* the application. See Brehmer v. Planning Board of Town of Wellfleet, 238 F.3d 117, 122 (1st Cir. 2001),[12] citing Roberts v. Southwestern Bell Mobile Sys., Inc., 429 Mass. 478, 709 N.E.2d 798, 806 (1999) ("Congress

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11 See, e.g., Southwestern Bell Mobile Systems, Inc., d/b/a Cellular One, v. Todd, 244 F.3d 51 (1st Cir. 2001); 360 Degrees Communications Company of Charlottesville v. Board of Supervisors of Albemarle County, et al., 211 F.3d 79 (4th Cir. 2000); Southwestern Bell Wireless, Inc. v. Johnson County Board of County Commissioners, 199 F.3d 1185 (10th Cir. 1999); Cellular Telephone Company v. Zoning Board of Adjustment of the Borough of Ho-Ho-Kus, 197 F.3d 64 (3rd Cir. 1999); APT Pittsburgh Limited Partnership v. Penn Township Butler County of Pennsylvania, 196 F.3d 469 (3rd Cir. 1999); Omnipoint Corporation v. Zoning Hearing Board of Pine Grove Township, 181 F.3d 403 (3rd Cir. 1999); Sprint Spectrum L.P. d/b/a Sprint PCS v. Willoth, 176 F.3d 630 (2nd Cir. 1999); Cellular Telephone Co. v. Town of Oyster Bay, 166 F.3d 490 (2nd Cir. 1999); Aegerter v. City of Delafield, Wisconsin, et al, 174 F.3d 886 (7th Cir. 1999); Town of Amherst, NH v. Omnipoint Communications Enterprises, Inc., 173 F.3d 9 (1st Cir. 1999); AT&T Wireless PCS, Inc. v. Winston Salem Zoning Board of Adjustment, 172 F.3d 307 (4th Cir. 1999); AT&T Wireless PCS, Inc. v. City Council of the City of Virginia Beach, 155 F.3d 423 (4th Cir. 1998); AT&T Wireless PCS, Inc. v. Town of Concord, et al., Civil Action No.99CV 11866 RWZ (D. Mass. 2001); Nextel Communications of the Mid-Atlantic, Inc. v. Manchester-by-the-Sea, 115 F.Supp.2d 65 (D. Mass. 2000); Omnipoint Communications MB Operations, LLC, v. Town of Lincoln, et al., 107 F. Supp.2d 108 (D. Mass. 2000); Telecorp Realty, LLC v. Town of Edgartown, 81 F. Supp.2d 257 (D.Mass. 2000); CELLCO Partnership d/b/a Bell Atlantic Mobile v. Town of Douglas, 81 F. Supp.2d 170 (D. Mass. 1999); Omnipoint Communications, Inc. v. Foster Twp., 46 F. Supp.2d 396 (M.D. Pa. 1999); Sprint Spectrum L.P. v. Town of North Stonington, 12 F. Supp.2d 247 (D. Conn. 1998); Smart SMR of New York, Inc. v. Zoning Commission of the Town of Stratford, 995 F. Supp. 52 (D. Conn. 1998); Sprint Spectrum L.P. v. Town of Easton, 982 F. Supp. 47 (D. Mass. 1997); Sprint Spectrum L.P. v. Town of Farmington, 1997 WL 631104 (D. Conn. 1997); OPM-USA-Inc. v. Board of County Commissioners of Brevard County, Florida, 7 F. Supp. 2d 1316 (M.D. Fla. 1997); AT&T Wireless Servs. of Fla., Inc. v. Orange County, 982 F. Supp. 856, 860-62 (M.D.Fla.1997); Century Cellunet of Southern Michigan, Inc. v. City of Ferrysburg, 993 F. Supp. 1072 (W.D. Mich. 1997); Western PCS II Corp. v. Extraterritorial Zoning Authority of the City and County of Santa Fe, 957 F. Supp. 1230 (D.N.M. 1997); BellSouth Mobility Inc. v. Gwinnett Cty., Ga., 944 F. Supp. 923 (N.D. Ga. 1996); Illinois RSA No. 3, Inc. v. City of Peoria, 963 F. Supp. 732 (C.D. Ill. 1997).

12 Brehmer was overruled on jurisdictional grounds in Metheny v. Becker, 352 F.3d 458 (1st Cir. 2003).

certainly intended to protect providers of [personal wireless] services from irrational or substanceless decisions by local authorities who might bend to community opposition to these facilities."); Omnipoint Corporation v. Zoning Hearing Board of Pine Grove Township, 181 F.3d 403, 408 fn. 5 (3rd Cir. 1999) ("the TCA does not authorize general appeals in federal court of state zoning decisions").[13] Instead, by specifically preserving certain state zoning authority, the TCA relegates truly "aggrieved" citizens to State court pursuant to the traditional avenues for seeking judicial review of final local zoning decisions. Roberts v. Southwestern Bell Mobile Systems, Inc., 429 Mass. 478, 709 N.E.2d 798 (1999) (holding that the TCA does not preempt the state statutory right to *de novo* judicial review of a planning board's decision to grant a permit allowing the construction of a wireless communication facility).[14]

**TCA Effective Prohibition**

The TCA prohibits a local board from denying a permit for a wireless communications facility where the Board's decision prohibits or has the effect of prohibiting the provision of personal wireless services. 47 U.S.C. § 332(c)(7)(B)(i)(II). An effective prohibition claim is

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13 See also Section 332(c)(7)(B)(iii) requiring "that *denials* of permits be in writing." Southwestern Bell Mobile Systems, Inc., d/b/a Cellular One, v. Todd, 244 F.3d 51, 59-60 (1st Cir.2001) (emphasis added, citation omitted):

> We conclude, therefore, that the TCA requires local boards to issue a written *denial* separate from the written record. That written *denial* must contain a sufficient explanation of the reasons for the permit *denial* to allow a reviewing court to evaluate the evidence in the record supporting those reasons.

14 A motion for intervention under Fed. R. Civ. P. 24 does provide a mechanism for an interested person to protect alleged interests in a case brought under Section 704 of the TCA. Maher v. Hyde, 272 F.3d 83, 88 (1st Cir. 2001) ("If the Mahers [nearby landowners] were concerned that their interests could be adversely affected by Hyde's [landlord/applicant] action against the Board, they could have petitioned to intervene in that litigation."). See also Brehmer v. Planning Board of the Town of Wellfleet, 238 F.2d 117, 122 (1st Cir. 2001)(in the circumstances of that case, the "appellants had the opportunity to intervene, and fully assert their rights, in the suit brought by Omnipoint against the Planning Board that ultimately led to the settlement agreement. Appellants failed, however, to avail themselves of that opportunity."), overruled on jurisdictional grounds, Metheny v. Becker, 352 F.3d 458 (1st Cir. 2003). The intrusion of intervenors interested only in stopping the proposed facility can interfere with both the goal of expediting the litigation and achieving a reasonable settlement. As a result, it generally behooves both the carrier and even the Town to oppose such intervention under Fed. R. Civ. P. 24. Cf. AT&T Wireless PCS, LLC v. Town of Stow, U.S. Dist. Ct. No. 01CV10555REK (Zobel, J., emergency judge) (August 13, 2001)(denying intervention as untimely), aff'd 1st Cir. 01-2269 (March 28, 2002).

reviewed *de novo* by the district court and is not limited to the record before the Board. See National Tower, LLC v. Plainville Zoning Board of Appeals, 297 F.3d 14, 24 (1st Cir. 2002) ("On the 'effective prohibition' issue, district courts may take evidence beyond the record"); Town of Amherst, NH v. Omnipoint Communications Enterprises, Inc., 173 F.3d 9, 16 n.7 (1st Cir. 1999) (Awhether the town has discriminated among carriers or created a general ban involves federal limitations on state authority, presenting issues that the district court would resolve *de novo* and for which outside evidence may be essential@). To establish a claim of effective prohibition, a carrier must demonstrate that a zoning authority has set out criteria or administers criteria in such a way that wireless facilities are effectively precluded. Id. A carrier can show effective prohibition by demonstrating that: (1) the relevant zoning policies and decisions result in a significant gap in wireless services within the municipality, and (2) not only that its application to erect a wireless facility to eliminate the demonstrated significant coverage gap was rejected but also that "further reasonable efforts are so likely to be fruitless that it is a waste of time even to try." Town of Amherst v. Omnipoint Communications Enterprises, Inc., 173 F.3d 9, 14 (1st Cir. 1999); Omnipoint Communications MB Operations, LLC v. Town of Lincoln, 107 F. Supp. 2d. 108, 115 (D. Mass. 2000).

The Aultimate question of course remains whether a given decision, ordinance, or policy amounts to an effective prohibition on the delivery of wireless services. Inquiries into the existence and type of gap are merely helpful analytic tools toward that end.@ Second Generation Properties, L.P. v. Town of Pelham, 313 F.3d at 631-632 (1st Cir. 2002).[15] "There can be no general rule classifying what is an effective prohibition. It is a case-by-case determination." Id.

15 The Act's "statutory bar against regulatory prohibition is absolute, and does not anticipate any deference to local findings." Cellular Telephone Company v. Zoning Board of Adjustment of the Borough of Ho-Ho-Kus, 197 F. 3d 64, 71 (3d Cir. 1999). Accord, National Tower v. Plainville Board of Appeals, 297 F.3d 14, 22 (1st Cir. 2002) ("without any deference to the board").

at 629. Examples of proof include the "two sets of circumstances where there is a prohibition 'in effect'":

(1) "where the town sets or administers criteria which are impossible for any applicant to meet." and

(2) "where the plaintiff's existing application is the only feasible plan." Id.

1. **Significant Coverage Gap**

Under the TCA and its progeny, an FCC-licensed carrier is to provide "seamless" coverage throughout the carrier's service territory. See National Tower, LLC v. Plainville Zoning Bd. of Appeals 297 F.3d 14, 17 (C.A.1 2002) (affirming the District Court's order for the issuance of variances and permit where the District Court concluded that the actions of the board effectively prohibited the provision of "seamless wireless service in Plainville in violation of 47 U.S.C. § 332(c)(7)(B)(i)(II)").[16]

In determining the extent of coverage for purposes of addressing an effective prohibition claim, the court may consider roaming service, coverage provided by towers in other towns and service by carriers not licensed in the jurisdiction at issue. Second Generation Properties, L.P. v.

16 In 2004, the carriers' need to provide seamless coverage was further bolstered by the passage of amendments to the National Telecommunications and Information Administration Organization Act, PL 108-494, December 23, 2004, 118 Stat 3986, entitled the "Ensuring Needed Help Arrives Near Callers Employing 911 Act of 2004" or the "ENHANCE 911 Act of 2004", which were designed to "facilitate the reallocation of spectrum from governmental to commercial users; to improve, enhance, and promote the Nation's homeland security, public safety, and citizen activated emergency response capabilities through the use of enhanced 911 services, to further upgrade Public Safety Answering Point capabilities and related functions in receiving E-911 calls, and to support in the construction and operation of a ubiquitous and reliable citizen activated system." These amendments complement the provisions of 47 USC § 615, calling for "seamless, ubiquitous, reliable wireless telecommunications networks and enhanced wireless 9-1-1 service;" Pub.L. 106-81, § 2, Oct. 26, 1999, 113 Stat. 1286(a)(6), calling for the "construction and operation of seamless, ubiquitous, and reliable wireless telecommunications systems [to] promote public safety and provide immediate and critical communications links among members of the public; emergency medical service providers and emergency dispatch providers; public safety, fire service and law enforcement officials; transportation officials, and hospital emergency and trauma care facilities;" and Pub.L. 106-81, § 2, Oct. 26, 1999, 113 Stat. 1286(b) (the Wireless Communications and Public Safety Act of 1999) whose purpose was to "encourage and facilitate the prompt deployment throughout the United States of a seamless, ubiquitous, and reliable end-to-end infrastructure for communications, including wireless communications, to meet the Nation's public safety and other communications needs."

Town of Pelham, 313 F.3d 620, 632 (1st Cir. 2002). The availability of coverage from another carrier in the area of an alleged coverage gap, however, does not preclude the determination that a municipality has effectively prohibited the delivery of personal wireless services. See id. at 632-33; National Tower Corp. v. Frey, 164 F.Supp.2d 185, 189 (D. Mass. 2001), aff'd, 297 F.3d 14 (1st Cir. 2002) (town cannot evade the mandate of the TCA by pointing to the fact that another provider has succeeded in supplying full coverage to a municipality).

"Whether a 'gap' constitutes a 'significant gap' depends not only upon its physical size, but also, and perhaps more significantly, upon the number of customers affected by that gap. Since wireless services … are used while in transit, a gap that straddles a heavily traveled commuter thoroughfare would be more significant than a gap that affects a small residential cul-de-sac." Omnipoint Communications MB Operations, LLC v. Town of Lincoln, 107 F.Supp.2d 108, 119 (D. Mass. 2000) citing Cellular Telephone Co. v. Zoning Board of Adjustment of the Borough of Ho-Ho-Kus, 197 F.3d 64, 70 n.2 (3d Cir. 1999).[17]

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17 As customer usage patterns change, a significant gap in a case arising today should also take into account not only first-generation in-vehicle coverage but also such factors as evolving in-building coverage, data transmission rate, and the like. See, e.g. U.S.C.O.C. OF New Hampshire RSA # 2, d/b/a U.S. Cellular v. Town of Dunbarton, 2005 WL 906354 (D.N.H. 2005) (Not for Publication):

> The TCA does not specifically address the issues of service inside of buildings or whether a significant gap in coverage exists. Courts have used the measure of a significant gap in coverage to apply the TCA's rule that local regulation cannot prohibit or effectively prohibit the provision of wireless services. See § 332(c)(7)(B)(i)(II); Second Generation, 313 F.3d at 629, 631-32; Cellular Tel. Co. v. Zoning Bd. of Adjustment, 197 F.3d 64, 70 (3d Cir.1999). In evaluating the extent of a gap in coverage, courts have considered the availability of both in-vehicle and in-building service. See, e.g., Sprint Spectrum, L.P. v. Willoth, 176 F.3d 630, 643 (2d Cir.1999). Therefore, the ZBA's conclusion, based on town counsel's representation, that in-home service was not pertinent for purposes of satisfying the requirements of the TCA was legal error and was also inconsistent with the evidence of record. [FN2]
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> FN2. It is true, however, that "[w]here holes in coverage are very limited in number or size (such as the interiors of buildings in a sparsely populated rural area, or confined to a limited number of houses or spots as the area covered by buildings increases) the lack of coverage likely will be de minimis so that denying applications to construct towers necessary to fill these holes will not amount to a prohibition of service." Willoth, 176 F.3d at 643-44. In this case, the ZBA rejected all evidence of gaps in service to homes

A. On Highways/Major Roads

A two-mile coverage gap on a major highway is significant. See National Tower Corp. v. Frey, 164 F.Supp.2d 185, 188 n.1 (D. Mass. 2001), aff=d on other grounds, 297 F.3d 14 (1st Cir. 2002) ("A two mile gap in coverage along two heavily traveled state highways carrying 27,000 vehicles a day" is a significant gap in coverage). Such a gap is large enough in terms of physical size and number of affected users to amount to an effective prohibition. See National Tower Corp. v. Frey, 297 F.3d 14, 17-20 (1st Cir. 2002).

A gap in coverage on commuter thoroughfares in municipalities is significant. Nextel Communications of the Mid-Atlantic, Inc. v. Town, 231 F.Supp.2d 396, 408 (D. Mass. 2002) (a gap in coverage in the central part of Wayland, including the commuter-heavy Routes 20 and 27 is significant); Omnipoint Holdings, Inc. v. Town of Westford, 206 F.Supp.2d 166, 170 (D. Mass. 2002) (significant gap in coverage existed in vicinity of Route 40 in Westford); Omnipoint Communications MB Operations, LLC v. Town of Lincoln, 107 F.Supp.2d 108, 119 (D. Mass. 2000) (coverage gap in large area of northwestern section of town that included heavily traveled commuter thoroughfares was significant).

B. Geographic area

A coverage gap in a large portion of a municipality or a coverage gap that encompasses an entire municipality that is not serviceable by a carrier's facilities located in other parts of the municipality or neighboring municipalities is significant. See Cellco Partnership v. Town of Grafton, 336 F.Supp.2d 71, 82-83 (D. Mass. 2004) (finding that the coverage gap in Grafton Center was significant because none of the ten or more wireless telecommunications facilities in Grafton provide service to the carrier's customers in Grafton Center); Nextel Communications of the Mid-Atlantic, Inc. v. Town of Provincetown, 2003 WL 21497159, *10 (D. Mass. 2003)

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and did not find that any such gaps were merely de minimis.

(significant coverage gap existed where unrefuted oral and documentary evidence indicated that a coverage gap existed which comprised virtually all of Provincetown); Omnipoint Communications MB Operations, LLC v. Town of Lincoln, 107 F.Supp. 2d 108, 119 (D. Mass. 2000) (coverage gap in large area of northwestern section of town that included heavily traveled commuter thorough fares was significant).

2. **Further Efforts Would Be Fruitless**

Any further reasonable efforts by a carrier are likely to be fruitless where the Board has denied multiple applications for a site indicating that the Board is not prepared to permit construction on the chosen site. National Tower v. Plainville Board of Appeals, 297 F.3d 14, 24-25 (1st Cir. 2002) (Board's denial of both of a carrier's applications, one for a radio tower and one for a public utility, indicated that further efforts would be fruitless and compelled conclusion that Board effectively prohibited provision of wireless services). But see National Telecommunication Advisors, LLC v. Bd. of Selectmen of the Town of West Stockbridge, 27 F.Supp.2d 284, 287 (D. Mass. 1998) (carrier did not show prohibition where the carrier could reapply for a special permit after the end of a six-month moratorium).

Further reasonable efforts by a carrier are likely to be futile where a by-law only permits wireless communications facilities on specific properties in an overlay district and the relevant properties are not available to carrier. Omnipoint Communications MB Operations, LLC v. Town of Lincoln, 107 F.Supp.2d 108, 119-20 (D. Mass. 2000) (carrier could not fill significant gap in coverage where by-law only permitted wireless communications facilities on specific properties in overlay district and the overlay district property at issue was not available for leasing to the carrier).

A. Hostility

Evidence of repeated delays and denials on the part of a Town demonstrate that Town's hostility towards a carrier and shows that further efforts on the part of the carrier are likely to be fruitless. See Nextel Communications of the Mid-Atlantic, Inc. v. Town of Wayland, 231 F.Supp.2d 396, 408-09 (D. Mass. 2002) (Town's delays included moratoriums, several repeals and revisions of zoning by-law provisions concerning wireless communication facilities, extended public hearings on an application for a variance, and several denials of zoning-related applications).

Further reasonable efforts by a carrier are likely to be fruitless where the carrier can establish fixed hostility by the Board indicating that further applications by the carrier would be useless. Town of Amherst, NH v. Omnipoint Communications Enterprises, Inc., 173 F.3d 9, 14 (1st Cir. 1999) (indicating that a board may exhibit "such fixed hostility … that one can conclude that further applications would be useless."). See Omnipoint Holdings, Inc. v. Town of Westford, 206 F.Supp.2d 166, 170 (D. Mass. 2002) (Board members' comments regarding fact that other uses exist for the site and that there will never be a hardship indicated that attempting to secure a variance for any other site from the Board would be a futile exercise).

3. **Impossible Criteria**

"Setting out criteria under the zoning law that no one could ever meet is an example of an effective prohibition." National Tower v. Plainville Zoning Board of Appeals, 297 F.3d 14, 23 (1st Cir. 2002) (the Board's denial of both of a carrier's applications, one for a radio tower and one for a public utility, is the sort of behavior that demonstrates that the Board would effectively prohibit the provision of gap-covering wireless services); Nextel Communications of the Mid-

Atlantic, Inc. v. Town of Provincetown, 2003 WL 21497159, *10 (D. Mass. 2003) (zoning by-law regulating telecommunications facilities as administered constituted effective prohibition because its stringent geographical requirements and the zoning board of appeal's claim that it lacked authority to grant variances from its requirements made it "virtually impossible for a wireless carrier to locate a wireless facility in or around Provincetown").

4. **Blanket Prohibition**

A telecommunications overlay district, which restricts the location of towers to certain districts, is not a blanket prohibition if the relevant board still has the power to grant variances to build towers in other districts. Second Generation Properties, L.P. v. Town of Pelham, 313 F.3d 620, 629 (1st Cir. 2002) (finding that the blanket prohibition claim is meritless where the Ordinance does not prohibit the grant of variances to build towers in other districts, the town has allowed other towers to be constructed, and the town has not said that it would never grant a variance outside of the overlay district).

5. **Only Feasible Plan/Full Evaluation of Alternative Locations**

A single denial of an application can violate the TCA if that denial is "shown to reflect, or represent, an effective prohibition on personal wireless service." Town of Amherst, NH v. Omnipoint Communications Enterprises, Inc., 173 F.3d 9, 14 (1st Cir. 1999). For example, if a carrier's existing proposal is the only feasible plan, then prohibiting its plan might amount to prohibiting personal wireless service in that town. Id.; National Tower Corp. v. Frey, 164 F.Supp.2d 185, 188 n.1 (D. Mass. 2001), aff=d, 297 F.3d 14 (1st Cir. 2002) (Board's denials of Omnipoint's applications effectively prohibited the provision of wireless services because there was no other potential site that was not subject to the same zoning restrictions that caused the Board to deny Omnipoint's applications); Nextel Communications of the Mid-Atlantic, Inc. v.

Town of Provincetown, 2003 WL 21497159, *10 (D. Mass. 2003) (the zoning board of appeals' denial of the carrier's proposal constituted effective prohibition because proposed site was only feasible plan for carrier to provide wireless services to the town because town had no other available sites to offer and facility proposed to be built in cupola was in tune with goals of bylaws to preserve scenic views as opposed to a free-standing tower); Omnipoint Holdings, Inc. v. Town of Westford, 206 F.Supp.2d 166, 170 (D. Mass. 2002) (denial of use variance had effect of prohibiting wireless services where carrier established that no alternative sites were available after diligently but unsuccessfully trying to secure five other sites and because town's proposed alternative sites were not actually feasible); Omnipoint Communications MB Operations, LLC v. Town of Lincoln, 107 F.Supp.2d 108, 120 (D. Mass. 2000) (carrier's plan was only feasible plan because proposed site was only viable, non-residentially zoned parcel that would fill any substantial portion of demonstrated gap aside from property in overlay district that was not available to carrier).

A single denial of an application based on a supportable finding that another location was available, however, would almost certainly fall short of an effective prohibition of wireless services. National Tower, LLP v. Plainville Zoning Board of Appeals, 297 F.3d 14, 24 (1st Cir. 2002); Town of Amherst, NH v. Omnipoint Communications Enterprises, Inc., 173 F.3d 9, 14 (1st Cir. 1999) (holding that the denial of several applications did not effectively prohibit the provision of wireless services where the carrier failed to investigate serious alternatives and the carrier did not show that the Board would reject alternative proposals with lower towers).

Conclusory statements by a carrier that alternative locations are not feasible are not enough to meet the burden of proving an effective prohibition of wireless services, rather the carrier must show in the record that it has fully investigated other available alternatives.

Southwestern Bell Mobile Systems, Inc. v. Todd, 244 F.3d 51, 63 (1st Cir. 2001) ("For a telecommunications provider to argue that a permit denial is impermissible because there are no alternative sites, it must develop a record demonstrating that it has made a full effort to evaluate the other available alternatives and that the alternatives are not feasible to serve its customers."); Second Generation Properties, L.P. v. Town of Pelham, 313 F. 3d 620, 635 (carrier failed to show that no alternative locations were available because it failed to show that a taller tower in the wireless district could not be built, that there were no other feasible sites outside the wireless district, or that the Zoning Board of Appeals would deny variances for such sites); Cellco Partnership v. Town of Grafton, 336 F.Supp.2d 71, 83-84 (D. Mass. 2004) (finding that planning board decision did not effectively prohibit personal wireless services because carrier failed to show that there were no feasible alternatives as planning board suggested several alternative sites and because carrier did not adequately consider the possibility of reconfiguring its network); Nextel Communications of the Mid-Atlantic, Inc. v. City of Cambridge, 246 F.Supp.2d 118, 123-25 (D. Mass. 2003) (carrier's explanation of why certain alternative sites had been rejected only established that the best alternatives were less desirable than the location at issue and did not support proposition that no feasible alternatives existed); Nextel Communications of the Mid-Atlantic, Inc. v. Town of Randolph, 193 F.Supp.2d 311, 320 (D. Mass. 2002) (Nextel's conclusory statements that locations it looked at were not "feasible" for "various reasons" and that no viable parcel exists within its search area were not sufficient to show effective prohibition of wireless services in the Town).

**Unreasonable Discrimination**

The TCA prohibits a local board from denying a permit for a wireless communications facility where the Board "unreasonably discriminate(s) among providers of functionally

equivalent services ...." 47 U.S.C. § 332(c)(7)(B)(i)(I).[18] Similar to an effective prohibition claim, an unreasonable discrimination claim is fact specific and is not limited to the record before the Board. See Town of Amherst, NH v. Omnipoint Communications Enterprises, Inc., 173 F.3d 9, 16 n.7 (1st Cir. 1999) (whether the town has discriminated among carriers ... involves federal limitations on state authority, presenting issues that the district court would resolve de novo and for which outside evidence may be essential).

A board's denial of a proposed installation constitutes unreasonable discrimination where the board bases its decision on the fact that some wireless communications are already available to the residents. Sprint Spectrum L.P. v. Town of Easton, 982 F. Supp. 47, 51 (D. Mass. 1997) (basis for board's decision was discriminatory where board determined, in effect, "that the existing cellular service in Easton is all that is necessary and that no further competition from Plaintiff, or presumably any other new entrant…, will be permitted).

A board's denial of a proposed installation also constitutes unreasonable discrimination where the proposed facility is similar to an installation on the same existing tower or in the same area, which the board previously approved. See, e.g., Nextel Partners, Inc. v. Town of Amherst, N.Y., 251 F. Supp. 2d 1187, 1193-95 (W.D.N.Y. 2003) (basis for board's decision was discriminatory where board offered no reason for denying an application to collocate on a tower that was virtually identical to another carrier's application to collocate on same tower, which the

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18 As explained in the legislative history of the Act:

> [T]he phrase "unreasonably discriminate among providers of functionally equivalent services" will provide localities with the flexibility to treat facilities that create different visual, aesthetic, or safety concerns differently to the extent permitted under generally applicable zoning requirements even if those facilities provide functionally equivalent services. For example, the conferees do not intend that if a State or local government grants a permit in a commercial district, it must also grant a permit for a competitor's 50-foot tower in a residential district.

H.R. Conf. Rep. No. 104-458, at 208, reprinted in 1996 U.S.C.C.A.N. at 222.

board approved two months earlier); AT&T Wireless Services of California, LLC v. City of Carlsbad, 308 F. Supp. 2d 1148, 1166 n. 62 (S.D. Cal. 2003) (board unreasonably discriminated against carrier where no reasonable basis existed to deny that carrier's application which was modeled on another carrier's installation, which the board had previously approved and which was located on the next block); Smart SMR of New York, Inc. v. Zoning Commission of the Town of Stratford, 995 F. Supp. 52, 59-60 (D. Conn. 1998) (the Commission discriminated against Nextel in denying permission for a facility on an existing 110' lattice tower used for a windmill in a residential zone, where it had granted another provider's application for a facility on an existing billboard in a light industrial district and it lacked a legitimate reason to deny Nextel's application); Illinois RSA No. 3, Inc. v. County of Peoria, 963 F. Supp. 732, 744 (C.D. Ill. 1997) (finding unreasonable discrimination where a cellular tower had previously been allowed in a residential district and another is denied without any reason); Western PCS II Corp. v. Extraterritorial Zoning Authority of the City and County of Santa Fe, 957 F. Supp. 1230, 1237-1238 (D.N.M. 1997) (denial of a digital facility on an existing water tank "either denies Western the opportunity to compete with its competitors along the I-25 corridor (and arguably throughout Santa Fe as a result), or it significantly increases Western's costs, and thereby reduces its ability to compete by requiring it to find an alternative site"; that denial both improperly discriminated between providers and effectively prohibited digital service).

A board's denial of a proposed installation, however, may not constitute unreasonable discrimination where a proposed installation varies significantly and materially from an existing one on the same location. Nextel Communications of the Mid-Atlantic, Inc. v. City of Cambridge, 246 F. Supp.2d 118, 123-25 (D. Mass. 2003) (finding no unreasonable discrimination in denial of Nextel's application where Nextel's proposed antennas would be

closer to ground and more visible to street traffic than existing ones and would have protruded from blank wall rather than being attached to hotel rooftop sign, as existing ones were). See also Sprint Spectrum L.P. d/b/a Sprint PCS v. Willoth, 176 F.3d 630 (2nd Cir. 1999) (Planning Board's denials of site plan approval for three 150' towers did not unreasonably discriminate, even though the town approved another provider's application for a facility in an industrial zone); AT&T Wireless PCS, Inc. v. City Council of Virginia Beach, 155 F.3d 423, 427-428 (4th Cir. 1998) (upholding the denial of permits for two 135' towers in a residential zone; the denial did not unreasonably discriminate because the Council did not intend to favor one company or form of service (digital or analog) over another, and the opposition rested on the traditional grounds of preserving the character of the neighborhood and avoiding aesthetic blight).

A board that provides a "fast-track" zoning process for carriers seeking to install facilities on municipal property but requires carriers seeking to install facilities on privately-owned property to undergo a more extensive zoning process unreasonably discriminates against the latter carriers. Omnipoint Communications, Inc. v. Common Council of the City of Peekskill, 202 F. Supp. 2d 210, 224-26 (S.D.N.Y. 2002) (Board admitted that it unreasonably discriminated against carriers of equivalent services because it treated applications of carriers to use municipal facilities differently than applications of carriers to use privately-owned property).

A moratorium on the issuance of special permits for wireless communications facilities alone (without evidence that a municipality has treated some carriers more favorably than others) does not rise to the level of discrimination. National Telecommunication Advisors, LLC v. Bd. of Selectmen of the Town of Stockbridge, 27 F.Supp.2d 284, 287 (D. Mass. 1998) (moratorium for which there was a valid basis and that was not aimed at one carrier specifically, but at the industry generally, did not discriminate against that carrier).

## Reasonable Period of Time

The TCA requires that a local board act on any request to place or construct personal wireless service facilities within a reasonable period of time. 47 U.S.C. § 332(c)(7)(B)(ii). "Congress implemented the "reasonable period of time" provision of the TCA to " 'stop local authorities from keeping wireless providers tied up in the hearing process' through invocation of state procedures, moratoria, or gimmicks." Masterpage Communications, Inc. v. Town of Olive, 2005 WL 2387838 at *9 (N.D.N.Y. 2005), citing Lucas v. Planning Bd. of Town of LaGrange, 7 F.Supp.2d 310, 321-22 (S.D.N.Y.1998) (quoting Sprint Spectrum L.P. v. Town of Easton, 982 F.Supp. 47, 50 (D.Mass.1997)). In Masterpage, 2005 WL 2387838 at *12-13, the Court granted summary judgment to the carrier, after considering the interplay between the TCA's anti-delay provisions and the attempt to invoke local ordinance for planning review and other matters:

> Even viewing the facts in the light most favorable to defendants, however, the Town Board's subsequent insistence that plaintiff return to the Planning Board for the third time to seek "reconsideration and re-approval of the subdivision", was unreasonable. First, although the Tower Law empowers the Town Board to request a recommendation from the Planning Board, it does not contain a provision which would authorize the Town Board to direct an applicant to apply to the Planning Board for a change in use of the subdivision. Second, the Tower Law specifically provides that the Town could have denied Masterpage's application on the basis that the proposed use was contrary to the use for which the subdivision was designated. See Tower Law, Section 7.G.4. ("... the Board may disapprove an application for any of the following reasons ... 4) The use or construction of Wireless Telecommunications Facilities which is contrary to an already stated purpose of a specific zoning or land use designation."). Thus, it was unreasonable for the Town Board to further delay action on Masterpage's application by referring it to the Planning Board, for the third time, to apply for reconsideration of the subdivision, as it had no authority to do so and could have instead denied the application, many months earlier, upon learning Masterpage's proposed use of the site was contrary to the site's recreational use designation.
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> As to the environmental issues, and the SEQRA review process, the Town Board had Masterpage's application for nearly two years as of April 2002, but

> had not taken the first step in reviewing the environmental impact of the facility, despite Shuster's recommendation on September 20, 2001, eight months earlier, that it: (1) obtain an alternative coverage analysis from Masterpage; or (2) approve (a) a conditioned negative declaration, or (b) a positive declaration with the requirement that Masterpage submit a Draft Environmental Impact Statement. Thus, the Town's further delay of Masterpage's application on these grounds was unreasonable. Accordingly, as there is no issue of material fact requiring trial, Masterpage is entitled to summary judgment on its unreasonable delay claim.

Similarly, in Tennessee ex rel. Wireless Income Properties, LLC v. City of Chattanooga, 403 F.3d 392 (6th Cir.2005), the Sixth Circuit cited and quoted the First Circuit's decision National Tower, 297 F.3d at 21-22, 24 (substantial evidence violation):

> The statutory requirements [of the TCA] that the board act within "a reasonable period of time," and that the reviewing court hear and decide the action "on an expedited basis," indicate that Congress did not intend multiple rounds of decisions and litigation, in which a court rejects one reason and then gives the board the opportunity, if it chooses, to proffer another. Instead, in the majority of cases the proper remedy for a zoning board decision that violates the Act will be an order, like the one the district court issued in this case, instructing the board to authorize construction.

By contrast, a "delay" of two months from application to denial is not unreasonable. Flynn v. Burman, 30 F.Supp.2d 68, 75 (D. Mass 1998) (a two-month period from application to denial of an emergency permit was not unreasonable where the parties negotiated and corresponded with one another during that period concerning conditions).

Early in the local regulation of wireless facilities, short-term moratoria on the issuance of special permits for wireless communications facilities were not unreasonable. National Telecommunication Advisors, LLC v. Bd. of Selectmen of the Town of West Stockbridge, 27 F.Supp.2d 284, 287 (D. Mass. 1998) (six-month moratorium to develop reasonable regulations regarding the placement of facilities was not unreasonable).[19]

19 A moratorium today – 10 years after cities and towns first began to regulate wireless facilities - may face a very different review form a federal court.

A regional planning authority's review of a project can toll the time limits under state law for a municipality to act on an application, and therefore the time taken for the review by the regional planning authority cannot be the basis for a claim that the municipality failed to act within a reasonable time. Flynn v. Burman, 30 F.Supp.2d 68, 74 (D. Mass 1998) (the Cape Cod Commission process did not violate §332(c)(7)(B)(ii) of the TCA requiring that the Board act "within a reasonable time" because the time limits under the Zoning Act were tolled pending the Commission's review of the project). "Circumstances might readily be imagined [, however,] in which a local authority might delay consideration of an application for a permit unreasonably even though the outside time limits under state or local law had not yet expired." Id. at 74-75.

**Substantial Evidence**

The TCA requires that a decision by a municipality regarding personal wireless service facilities "shall be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. § 332(c)(7)(B)(iii). See Second Generation Properties v. Town of Pelham, 313 F.3d 620, 627 (1st Cir. 2002); Nextel Communications of the Mid-Atlantic, Inc. v. Manchester-by-the-Sea, 115 F. Supp.2d 65, 66 (D. Mass. 2000). ASubstantial evidence@ review under the TCA is Acentrally directed to those rulings that the Board is expected to make under state law and local ordinance in deciding on variances, special exceptions and the like.@ Town of Amherst, NH v. Omnipoint Communications Enterprises, Inc., 173 F.3d 9, 16 (1st Cir. 1999); see Southwestern Bell Mobile Systems, Inc. v. Todd, 244 F.3d 51, 58 (1st Cir. 2001).

The substantial evidence standard of review under the TCA is "the same as that traditionally applicable to a review of an administrative agency's finding of facts." Southwestern Bell Mobile Systems, Inc. v. Todd, 244 F.3d 51, 58 (1st Cir. 2001). Substantial evidence is that which a "reasonable mind might accept as adequate to support a conclusion." Id. (citation

omitted); see Omnipoint Communications MB Operations, LLC v. Town of Lincoln, 107 F. Supp. 2d. 108, 115 (D. Mass. 2000). The court A>may not ignore evidence presented by the applicant,=@ and where A>evidence is uncontroverted, there must be a good reason for rejecting it.=@ Omnipoint Communications MB Operations, LLC v. Town of Lincoln, 107 F.Supp. 2d. 108, 115 (D. Mass. 2000) (citation omitted).

Substantial evidence review is based only upon evidence contained in the administrative record. Second Generation Properties, L.P. v. Town of Pelham, 313 F. 3d 620, 628 (1st Cir. 2002). In performing the review, the Court does not merely review portions of the decision at issue; it reviews the entire decision and determines which, if any, rationales are supported by substantial evidence. See Cellular Telephone Company v. Zoning Board of Adjustment of the Borough of Ho-Ho-Kus, 197 F.3d 64, 72-74 (3d Cir. 1999) (reaching and reversing for lack of substantial evidence on the service gap issue, although the Court found substantial evidence to support the finding that the proposal would have a substantial detrimental impact on property values.). Cf. ATC Realty, LLC v. Town of Kingston, NH, 303 F.3d 91, 95 (1st Cir. 2002) (reviewing all four of the Board's reasons); Southwestern Bell Mobile Systems, Inc. v. Todd, 244 F.3d 51, 60-63 (1st Cir. 2001) (reaching both aesthetic and alternate sites issues).

After addressing the "written decision" requirement, this memorandum will address the substantial evidence requirement in the context of visual impact, safety concerns, property values, coverage gaps, alternative sites, cooperation among service providers, health concerns, variances, by-laws, and moratorium.

1. **Written Decision Requirement**

Municipal boards must issue a written denial separate from the written record under the TCA. A written denial must contain an explanation of the reasons for the denial sufficient to

allow a reviewing court to evaluate the evidence in the record supporting those reasons for denial. The denial, however, need not contain formal findings of fact or conclusions of law and need not state every fact in the record that supports the denial. National Tower v. Plainville Zoning Board of Appeals, 297 F.3d 14, 21 (1st Cir. 2002); Southwestern Bell Mobile Systems, Inc. v. Todd, 244 F.3d 51, 59-60 (1st Cir. 2001) (finding the short written decision of the Zoning Board of Appeals, which offered little explanation and few facts, to be adequate because it stated the reasons of its decision with enough clarity to allow the court to assess the evidence in the record supporting those reasons).

A board, however, may not provide the applicant with one reason for a denial and, then, in court, seek to uphold its decision on different grounds. A court generally can only affirm a board on grounds contained in the board's decision. National Tower v. Plainville Zoning Board of Appeals, 297 F.3d 14, 21 (1st Cir. 2002); Cellco Partnership v. Town of Douglas, 81 F. Supp. 2d 170, 174 (D. Mass. 1999) (where decision from zoning board of appeals failed to identify any reasons for its denial of variances, the town can not rely on an affidavit of a board member to supplement the decision).

Where the reasons for denial are contained within the minutes of the local zoning authority and those minutes are subsequently incorporated by reference into its decision, that decision constitutes a written decision in conformance with the TCA. Nextel Communications of the Mid-Atlantic, Inc. v. Town of Sudbury, 2003 WL 543383 at *9-*10 (D. Mass. 2003) (reasons contained in minutes incorporated by reference in the decision were sufficient to satisfy the written decision requirement).

A written decision that provides a reason for a denial but then simply mis-cites the applicable zoning provision is an adequate written decision, and the court can "look beyond the

clerical error and perform its review function." See Nextel Communications of the Mid-Atlantic, Inc. v. Town of Randolph, 193 F.Supp.2d 311, 319 (D. Mass. 2002) (remanding the case for a new written decision where the written record suggested that the majority of the Board most likely had a concern about setback requirements but the written decision was "nebulous" and the citations to the Bylaw cited by each Board member as the basis for rejecting the application were "plainly wrong").

In AT & T Wireless PCS, LLC v. Town of Charlestown, RI, 2005 WL 1231967, *1 (D.R.I.) (D.R.I.,2005), the District Court granted Plaintiffs' motion for summary judgment that the Zoning Board's written decision does not meet the requirements of the Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7)(B)(iii). The Court remanded the matter to the Zoning Board and ordered the Zoning Board to issue its written decision on this matter (assuming no delay caused by Plaintiffs) within sixty days of the issuance of the Order. The written decision on remand "should comply fully with the requirements of 47 U.S.C. § 332(c)(7)(B)(iii)" and "remand will be solely to allow Plaintiffs to satisfy the five prerequisites for issuance of a Special Use Permit under the Charleston Zoning Ordinance, with which Plaintiffs have previously failed to comply, … and that further denial of the application may only be based on Plaintiffs' failure to satisfy these requirements." Id. at 1.

2. **Visual Impact**

The generalized concerns of a small number of people about the aesthetic and visual impact of a proposed tower do not constitute the substantial evidence required to deny a request for a permit, particularly where experts or other administrative bodies have expressed a contrary view. Nextel Communications of the Mid-Atlantic, Inc. v. Town of Sudbury, 2003 WL 543383 at *15 (D. Mass. 2003) (generalized objection of one resident that tower would be a "visual

nuisance" does not constitute substantial evidence to support a denial); Nextel Communications of the Mid-Atlantic, Inc. v. Manchester-by-the-Sea, 115 F.Supp.2d 65, 68-70, 72 (D. Mass. 2000) (statements of generalized concern about aesthetics from small number of residents were insufficient to support denial of special permit by Planning Board, especially where the Massachusetts Historical Commission and the Zoning Board of Appeals did not express any such concerns in their review of the flagpole design); Telecorp Realty v. Town of Edgartown, 81 F. Supp. 2d 257, 260 (D. Mass. 2000) (constituent concern for the aesthetic consequences of adding additional antennae to a tower without additional evidence in support of the aesthetic concerns does not amount to substantial evidence).[20] Compare ATC Realty, LLC v. Town of Kingston, 303 F.3d 91, 97-98 (1st Cir. 2002) (holding town planning board's decision to approve proposal was supported by substantial evidence where nearly forty percent of residential abutters complained, some in general terms, about aesthetic impact of rejected facility whereas no one had complained about aesthetic impact of approved facility which was virtually identical to rejected proposal in all other respects).

Concerns about visual impact are not supported by substantial evidence where there is evidence that telecommunications towers are difficult to see or are aesthetically compatible with the character of the area. Nextel Communications of the Mid-Atlantic, Inc. v. Town of Sudbury, 2003 WL 543383 at *14-*15 (D. Mass. 2003) (Board's basis for concluding that a proposed tower would be a visual nuisance was not supported by substantial evidence where Nextel's View Shed Analysis showed that the tower would not be visible from seven out of eight

20 See also, Cellular Telephone Co. d/b/a AWS v. Town of Oyster Bay, 166 F.2d 490, 495-496 (2d Cir. 1999) (Board's denials of special permits for facilities on existing water towers were not supported by substantial evidence where very few residents expressed aesthetic concerns at the hearings; the court found it unclear if residents will be able even to see the antennae, let alone "experience a negative visual impact on the community;" and "the few generalized expressions of concern" with aesthetics did not constitute substantial evidence); Western PCS II Corp. v. Extraterritorial Zoning Authority of the City and County of Santa Fe, 957 F. Supp. 1230, 1237 (D.N.M. 1997) (no substantial evidence that a facility on an existing water tank would have significant visual impact).

locations and would be well-screened by trees throughout the year and where the record showed almost no discussion by the Board of the visual nuisance and no discussion of the alleged crane test); Nextel Communications of the Mid-Atlantic, Inc. v. Manchester-by-the-Sea, 115 F.Supp.2d 65, 72 (D. Mass. 2000) (Planning Board's denial of special permit was not supported by substantial evidence where administrative record contained evidence indicating that tower's flagpole design was in keeping with nautical character of the area and would visually blend in with the masts of vessels in the area).

A board may make an aesthetic judgment about whether the visual impact of a wireless communication facility is minimal where the administrative record contains evidence relating to the visual impact on the specific areas at issue in the case. Southwestern Bell Mobile Systems, Inc. v. Todd, 244 F.3d 51, 58 (1st Cir. 2001) (finding substantial evidence to support the Board's conclusion that a tower would have more than minimal visual impact where the 150-foot tower was to be placed on top of a 50-foot hill in the middle of a cleared field, and the location had no trees, was in the center of town, would be visible all seasons of the year, would be seen every day by 25% of the population of the town, and was in close proximity to three schools and two residential subdivisions); Cellco Partnership v. Town of Grafton, 336 F.Supp.2d 71, 79-81 (D. Mass. 2004) (planning board's finding that tower would have negative visual impact on historic green was supported by substantial evidence in the form of letters of opposition from residents and the Grafton Historic District Commission, oral protests at the public hearing, and a petition signed by 273 residents, which were all concerned with the appropriateness of the tower for the particular location at issue); Nextel Communications of the Mid-Atlantic, Inc. v. City of Cambridge, 246 F. Supp. 2d 118, 123-25 (D. Mass. 2003) (decision denying special permit based on aesthetic concerns was supported by substantial evidence where record contained evidence

that project was too visible because it would place visually unattractive protrusions too low to the ground close to street-level traffic and on the face of hotel's flat, blank brick wall, an important characteristic of the design of the hotel, and that the equipment shelter was too prominent an addition to the roofline). But see Nextel Communications of the Mid-Atlantic, Inc. v. Manchester-by-the-Sea, 115 F.Supp.2d 65, 71-72 (D. Mass. 2000) (generalized concerns about aesthetics did not amount to substantial evidence where residents did not offer photographic evidence, property appraisal or expert evidence with regard to aesthetics or injury to property values).

3. **Safety Concerns**

Where safety concerns rested upon "hollow generalities and empty records," courts have overturned denials of permits. Town of Amherst, NH v. Omnipoint Communications Enter., Inc., 173 F.3d 9, 16 (1st Cir. 1999). For example, in denying an application for a proposed tower, a Board may seize the failure of a differently designed and constructed tower (such as the tower failure in Oswego, New York). In the face of testimony by the applicant's fully qualified experts that the proposed tower was designed according to applicable codes and to protect public safety, the Board's attempt to equate the Oswego tower with the proposed tower without any evidence of structural similarity and in the face of contrary expert opinion should fail the substantial evidence test. As the First Circuit has observed, "[i]n a number of cases, courts have overturned denials of permits, finding (for example) that *safety concerns* and aesthetic objections rested on hollow generalities and empty records." Town of Amherst, NH v. Omnipoint Communications Enter., Inc., 173 F.3d 9, 16 (1st Cir. 1999)(emphasis added) and cases cited. This unsubstantiated safety objection would be one of those cases. See also, Group EMF, Inc. v. Coweta County , 131 F.Supp. 2d 1335 (N.D. Ga. 2000), citing OPM-USA-Inc. v. Brevard

County, Florida, 7 Supp.2d 1316, 1324 (M.D. Fla. 1997); Iowa Wireless Serv., L.P. v. City of Moline, 29 F.Supp.2d 915, 921 (C.D. Ill. 1998); See also Omnipoint Communications, Inc. v. Village of Tarrytown Planning Board, 302 F.Supp.2d 205, 222-23 (S.D.N.Y. 2004).

4. **Property Values**

The impact of a telecommunications tower upon real estate values is a matter of proof, requiring expert appraisal testimony, not an opportunity for unfounded assertions by abutters or the Board. Nextel Communications, Inc. v. Manchester-by-the-Sea, 115 F.Supp.2d 65, 71-72 (D. Mass. 2000) (the generalized concern of a member of the Planning Board concerning property devaluation, without property appraisals or other supporting expert evidence concerning possible injury to property values, does not amount to substantial evidence). See also Cellular Telephone Co. d/b/a AWS v. Town of Oyster Bay, 166 F.2d 490, 496 (2d Cir. 1999) (a "few generalized concerns" about a potential decrease in property values, even including an affidavit of a real estate broker, was insufficient, especially in light of AT&T's expert testimony to the contrary); Illinois RSA No. 3, Inc. v. County of Peoria, 963 F. Supp. 732, 744 (C.D. Ill. 1997) (generalized non-expert objections to the site cannot constitute substantial evidence that the 140' tower would adversely affect property values); OPM-USA-Inc. v. Board of County Commissioners of Brevard County, Florida, 7 F. Supp. 2d 1316, (M.D. Fla. 1997) (no substantial evidence that the 340 or 400' tower would be totally foreign to the natural and community aesthetics where there are two other towers within view, or that the tower would adversely affect property values).

Because of the importance of expert appraisal testimony on the issue of property damages, litigators can expect more motions of the type that succeeded in Ramey v. D'Agostini, et al., Civil Action No. 05-890 (Essex Superior Court, Whitehead, J.) (Nov. 9, 2005) (excluding

from evidence an appraiser's affidavit indicating that a proposed wireless communication facility on land abutting the plaintiff's property would diminish the value of the plaintiff's property).[21] Without such expert evidence, abutter appeals may, as here, be summarily dismissed. Id. ("Absent evidence of a diminution in the value of her property resulting from the construction of the pole, the plaintiff is unable to rebut [defendant] Omnipoint [Holdings, Inc.'s] challenge to her standing as an 'aggrieved' party. Accordingly, summary judgment must be awarded to the defendant."). See also Denneny v. Zoning Bd. of Appeals of Seekonk, 59 Mass.App.Ct. 208, 213-214 (2003):

> Cellco offered the opinion of a qualified expert witness that construction of the communications tower on the water district lot would not reduce the market value of the plaintiff's property given that the lot already contained a water tank of a height almost equal to that of the proposed tower. His opinion was supported by a market study of comparable Bristol County residential properties. We can pass Cellco's contention that the judge improperly discounted the expert's opinion because of an erroneous view regarding the comparability of the properties chosen in the study. That opinion, even given less weight than that to which it may have been entitled, remained the only competent evidence on the subject of value. Cellco's evidence thrust on the plaintiff the burden of putting forth credible evidence substantiating her allegation that the communications tower would bring about a deterioration in the market value of her property. Her testimony that "per se, the proximity of a tower reduces the

21 In a "Daubert" type opinion, the Superior Court Judge ruled:

> Here, the plaintiff has presented an affidavit by James J. Casell, an experienced real estate broker and appraiser. Mr. Casell viewed the property as well as photographs provided by the defendant which depict [the plaintiff's] home from multiple angles with a picture of the proposed cellular phone tower artificially placed in the background. Based on these observances, Mr. Casell opined that the property will decrease in value by five to ten percent due to the construction of the cell phone tower. Mr. Casell's affidavit is not competent evidence of a diminution or property value for a number of reasons: (1) he has not indicated any particular knowledge or experience related to the locality of the [plaintiff's] home, excepting his viewing of the home; (2) he has not indicated any particular experience evaluating the effects on property values due to the construction of cell phone towers; and (3) his opinion regarding the diminution of value of [the plaintiff's] property is conclusory because he has provided no explanation in support of his opinion. Accordingly, Mr. Casell's affidavit is not competent evidence of the diminution of value to [the plaintiff's] property as the result of the construction of a cell phone tower on abutting land. The affidavit must be stricken.

value of property" was speculative and conclusory, and insufficient to warrant a finding of aggrieved person status on this issue.

5. **Coverage Gaps**

Radio frequency coverage maps are commonly relied upon by wireless carriers, zoning boards, and courts to determine the extent of coverage in a given locality. *See e.g.,* Omnipoint Communications MB Operations, LLC v. Town of Lincoln, 107 F.Supp. 2d. 108, 118-119 & n.11 (D. Mass. 2000) (computer projections demonstrated significant gaps in coverage, notwithstanding Town=s contention that a drive test should have been done) (dictum); Town of Sudbury, 2003 WL 543383 at *12 (relying on coverage maps to find that the Board's determination that Nextel's existing coverage was sufficient was not supported by substantial evidence).

Anecdotal evidence from laypersons consisting of subjective impressions of how their phone functioned during a drive-around test does not constitute substantial evidence of coverage gaps or the lack thereof. Nextel Communications of the Mid-Atlantic, Inc. v. Town of Sudbury, 2003 WL 543383 at *11-*12 (D. Mass. 2003) (concluding that a reasonable person evaluating the evidence would find the ZBA's preference for the ZBA member's "semi-scientific [drive-around] test" over Nextel's evidence in the form of coverage maps and a radio frequency report, does not satisfy the substantial evidence standard).

6. **Alternative Sites**

A denial of a variance based on an unsubstantiated conclusion by a local zoning authority that alternative sites existed that would not require the granting of a variance is not supported by substantial evidence. Nextel Communications of the Mid-Atlantic, Inc. v. Town of Provincetown, 2003 WL 21497159, *9 (D. Mass. 2003) (conclusion that other sites suggested by board, which would not require a variance, were available to carrier was not supported by

substantial evidence where record indicated that those sites were either not available for development or would, in fact, require a variance).

7. **Cooperation Among Service Providers/Overload Capacity**

A local zoning authority's determination that a tower had reached overload capacity and could not support additional antennae was not supported by substantial evidence where the record contained a structural report, submitted by the carrier, indicating that additional antennae could be attached to the tower and the local zoning authority did not provide any reasons for refuting the report. Telecorp Realty, LLC v. Town of Edgartown, 81 F.Supp.2d 257, 259-60 (D. Mass. 2000).

8. **Health Concerns**

The generalized health concerns of a small number of residents do not constitute substantial evidence required to deny a request for a permit. Telecorp Realty, LLC v. Town of Edgartown, 81 F.Supp.2d 257, 260-61 (D. Mass. 2000).[22] The reason is simple: as a matter of federal law, a board has no right to deny an application for a wireless communication facility based upon alleged concerns about the health or environmental effects of radio frequency emissions. 47 U.S.C. § 332 (c) (7) (B) (iv). See, e.g. Roberts v. Southwestern Bell, 429 Mass. at

22 A number of Bylaws seek to regulate the radio frequency emissions from personal wireless services facilities. Based upon extensive authority applying well-settled principles of preemption and federal communications law to render unlawful local regulations of emissions governed by the FCC, such local regulations are preempted. See Freeman v. Burlington Broadcasters, Inc., 204 F.3d 311 (2d Cir. 2000); Southwestern Bell Wireless, Inc. v. Johnson County Board of County Commissioners, 199 F.3d 1185 (10th Cir. 1999); Cellular Phone Task Force v. Federal Communications Commission, 205 F.3d 82, 88 (2nd Cir. 2000). In In re Cingular Wireless, L.L.C, FCC Docket No. 02-100 (July 7, 2003), the FCC held that federal law preempts a local government's attempt to regulate radio frequency interference ("RFI") with local public safety communications systems. In sweeping language, the FCC indicated that local zoning provisions having the "intent and effect ... to regulate the operations - not the placement, construction and modification - of licensed facilities" are preempted because they focus on "radio frequency regulation rather than local land use concerns" (at page 10-11). Nor are preempted local regulations saved by the claim that the local government is attempting to "assure itself that a carrier is complying with FCC standards" where the regulation is "effectively regulating federally licensed operation" as opposed to "traditional zoning regulation of the physical facility" (at page 11). Accordingly, federal law preempts any and all provisions of the Wireless Bylaw or conditions imposed within a Special Permit affecting the operations of the FCC-licensed facilities, including regulations pertaining to emissions.

481-82; Cellular Telephone Company v. Town of Oyster Bay, 166 F.3d at 494-495 and cases cited, & n.3 (2nd Cir. 1999); AT&T Wireless PCS, Inc. v. City Council of Virginia Beach, 155 F.3d 423, 431 n.6 (4th Cir. 1998) (the Act precludes consideration of "health concerns from radio emissions").

9. **"TCA Variances"**

The need to close a significant gap in coverage, which is necessary to avoid an effective prohibition of wireless services, is a unique circumstance (in addition to state statutory circumstances relating to soil condition, shape or topography) which a Board's decision denying a variance must address in order for the decision to be supported by substantial evidence. Nextel Communications of the Mid-Atlantic, Inc. v. Town of Wayland, 231 F.Supp.2d 396, 406-07 (D. Mass. 2002) (finding that the Board's decision denying a dimensional variance was not supported by substantial evidence because it addressed incorrect factual conclusions concerning soil condition, shape or topography and did not address the additional potential unique circumstance concerning the need to close a significant gap in coverage).[23] The Wayland decision is consistent with previous District Court of Massachusetts decisions, AT&T Wireless PCS, Inc. v. Town of Concord, Civil Action No. 99-CV-18866-ROZ (D. Mass. 2001) and Omnipoint Communications v. Town of Lincoln, 107 F. Supp.2d 108 (D. Mass 2000), both of which ordered the issuance of use variances for locations outside of the overlay districts enumerated in the Bylaw. Each court found that the carriers could not provide the required

[23] The authority of a federal court to order a "TCA variance" is consistent with principles of federal preemption: Where a state law conflicts with federal law, the federal law takes precedence or preempts the local law. City of New York v. FCC, 486 U.S. 57, 63 (1988); Mount Olivet Cemetery Ass'n v. Salt Lake City, 164 F.3d 480, 486 (10th Cir. 1998); Paging, Inc. v. Board of Zoning Appeals for the County of Montgomery, 957 F. Supp. 805, 808 (W.D. Va. 1997). Federal preemption applies equally to the preemption of local zoning ordinances. *See* Mount Olivet, 164 F.3d at 486 ("the zoning ordinance is not applicable to the Association if preempted by federal law."); Sprint Spectrum L.P. v. Town of Easton, 982 F. Supp. 47, 50 (D. Mass. 1997)("Courts have, accordingly recognized that the TCA effects substantive changes to the local zoning process")(internal quotations and citations omitted); Paging, Inc., 957 F. Supp. at 808.

coverage from locations within the overlay districts and that therefore a variance must be issued to avoid violating the TCA's effective prohibition provision.[24]

Where a zoning board does not fully consider the possibility that its denial of a variance may violate the TCA, its decision is not supported by substantial evidence. Nextel Communications of the Mid-Atlantic, Inc. v. Town of Provincetown, 2003 WL 21497159, * 8 (D. Mass. 2003) (Zoning Board of Appeals' decision denying variances was not supported by substantial evidence because the Board did not fully consider the possibility that the enforcement of setback provisions in the wireless communications facility bylaws might violate the TCA); Nextel Communications of the Mid-Atlantic, Inc. v. Town of Wayland, 231 F.Supp.2d 396, 406-07 (D. Mass. 2002) (possibility that a zoning decision concerning a variance might violate the TCA is evidence which a local zoning authority must consider).

10. **By-laws/Regulations**

The failure of a Board to provide particular evidence as to why a proposed tower derogates and nullifies a zoning bylaw constitutes a failure to demonstrate substantial evidence. Nextel Communications of the Mid-Atlantic, Inc. v. Town of Sudbury, 2003 WL 543383 at *15-16 (D. Mass. 2003) (denial based on grounds that approving the location of wireless communication facility would defeat the purpose of the zoning bylaw was not supported by substantial evidence where record showed that Board was "working actively against the express

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24 Town Counsel from the municipal law firm Kopelman & Paige, P.C., have so advised clients. See letter to the Board of Appeals of the Town of Kingston, dated January 3, 2003, in which Town Counsel stated:

> "[I]t is … my opinion that under the legal framework created by the federal Telecommunications Act of 1996, 47 U.S.C. §332(c)(7) ("TCA"), the Board has a separate source of authority to grant relief that is equivalent of a use variance. In other words, it is my opinion that while state law and the Bylaws would not authorize the Board to grant a use variance, under federal law the Board could do so."

Town Counsel goes on to state, "It is therefore my opinion that under the federal mandate of the TCA, the federal courts have ruled that the principles of the TCA override the state law on variances and that the Board has the authority under the TCA [to] issue the permits, including a [use] variance."

purpose of the bylaw to promote 'shared use of the facilities' by refusing to issue RFPs that would make such shared use possible); Cellco Partnership v. Town of Douglas, 81 F.Supp.2d 170, 174 (D. Mass. 1999) (failure of town to provide particular evidence as to why proposed wireless communications facility derogates and nullifies zoning bylaw constitutes failure to demonstrate substantial evidence).

A denial of an application for zoning relief that is based on a reasonable legal interpretation of a valid by-law is supported by substantial evidence. Omnipoint Communications MB Operations, LLC v. Town of Lincoln, 107 F.Supp.2d 108, 117 (D. Mass. 2000) (denial of request for extension of non-conforming use and for use variance was supported by substantial evidence given Board's reasonable legal interpretation of requirements of its by-law). Where regulations are ambiguous as to the issue before a board, the board's decision as to the application of the regulations may be supported by substantial evidence where the board provides a written record of its reasoned debate indicating how it chose between reasonable inferences. See Nextel Communications of the Mid-Atlantic, Inc. v. Town of Hanson, 311 F.Supp.2d 142, 168 (D. Mass. 2004) (determination by State Building Code Appeals Board that provision of Building Code concerning setback for a roof-mounted antenna applied to proposed telecommunications facility was supported by substantial evidence).

11. **Moratorium**

A decision denying an application for a special permit to construct a wireless communications facility based on a moratorium is supported by substantial evidence where the moratorium is valid. National Telecommunication Advisors, LLC v. Bd. of Selectmen of the Town of West Stockbridge, 27 F.Supp.2d 284, 287 (D. Mass. 1998) (denial of special permit based on six-month moratorium was supported by substantial evidence).

12. **Injunctive Relief**

"In the majority of cases the proper remedy for a zoning board decision that violates the Act will be an order [in the form of an injunction] … instructing the board to authorize construction." National Tower v. Plainville Zoning Board of Appeals, 297 F.3d 14, 21-22, 24 (1st Cir. 2002) (affirming the district court's issuance of an injunction to the Plainville Zoning Board of Appeals requiring it to issue dimensional and use variances and the special permit necessary for the construction of a 170-foot lattice tower and maintenance facility); Nextel Communications of the Mid-Atlantic, Inc. v. Town of Wayland, 231 F.Supp.2d 396, 409-10 (2002) (granting an injunction requiring the Zoning Board of Appeals to authorize the carrier's construction of its antennas where the Town violated the TCA); Omnipoint Communications MB Operations, LLC v. Town of Lincoln, 107 F.Supp.2d 108, 121 (D. Mass. 2000) (granting an injunction requiring the town to issue any necessary special permits, variances, and building permits to permit the carrier to erect its wireless communications facility); Telecorp Realty, LLC v. Town of Edgartown, 81 F.Supp.2d 257, 260-61 (D. Mass. 2000) (granting a preliminary injunction directing the planning board to issue the requested special permit and building permit and stating that "every day that Plaintiff=s special permit is denied is a day Plaintiff loses against its major competitors… In today=s quickly advancing world of telecommunications services, the costs of delay cannot be understated.").

A remand may be a more appropriate remedy than an injunction in an instance of "good-faith confusion by a board that has acted promptly." National Tower v. Plainville Zoning Board of Appeals, 297 F.3d 14, 24 (1st Cir. 2002).

## SETTLEMENT STRATEGIES

Against this backdrop, both the First Circuit and the Federal District Court have expressly encouraged settlement between wireless providers and zoning boards in appropriate circumstances. See Brehmer v. Planning Board of the Town of Wellfleet, 238 F.3d 117 (1st Cir. 2001), overruled on unrelated jurisdictional grounds, Metheny v. Becker, 352 F.3d 458 (1st Cir. 2003); Omnipoint Communications, Inc., et al., 238 F.3d 117, 121 (1st Cir. 2001) (concluding that, in cases under the Federal Telecommunications Act of 1996, it is "not unreasonable for the board to settle with the applicant on the terms most favorable to the town" and that such settlements "are fully consistent with the TCA's aims"); Town of Amherst, New Hampshire v. Omnipoint Communications, 173 F.3d 9, 16-17 (1st Cir. 1999) ("[I]t is in the common interest of [zoning boards] and [telecommunications companies] to find ways to permit the sitting of towers in a way most congenial to local zoning"); Patterson v. Omnipoint Communications, Inc., 122 F. Supp.2d 222, 228 (D. Mass. 2000) (in appropriate circumstances, "it behooves that board to settle with the Plaintiff company on the most favorable terms possible; rather than spend more on litigation, with the potential to receive less favorable terms from a judgment"). Given the evolution of case law largely in favor of carriers, including the case law discussed above and the case law that follows concerning settlement agreements, removal and federal preemption, municipalities have a substantial incentive to settle.[25]

25 A recent Supreme Court decision appears to have removed a potentially significant financial incentive for municipalities to settle as well. See City of Rancho Palos Verdes, Cal. v. Abrams, 125 S.Ct. 1453 (2005) (amateur radio operator, who was denied conditional use permit to build radio tower on his property, cannot enforce the TCA limitations on local zoning authority through a § 1983 action). The Supreme Court's decision, effectively undercuts cases such as Omnipoint Communications, Inc. v. the City of White Plains, 175 F. Supp.2d 697 (S.D.N.Y. 2001); unpublished decision 01CV3285 (S.D.N.Y. 2004). et al., stemming from the City of White Plains' denial of Omnipoint's application for a special permit to construct a 150' telecommunications monopole at a golf course. The Court found that the City's decision was not based on substantial evidence and awarded $1,558,818.08 in damages, costs and fees to Omnipoint under § 1983. Damages included costs incurred in the zoning process, over $1M in lost revenue, lost rents, the incremental costs of building another facility, and attorneys fees. By removing the specter of such awards under § 1983, Rancho Palos Verdes leveled the playing field considerably in terms of bargaining

### 1. Settlement Agreement

The court may endorse a settlement agreement that requires a municipal board to issue a special permit to a carrier without holding a public hearing. See Brehmer v. Planning Board of the Town of Wellfleet, 238 F.3d 117, 120- 22 (1st Cir. 2001) (holding that town planning board did not need to hold a public hearing before issuing a special permit to the carrier pursuant to a consent judgment settling the carrier's claim that the prior denial of the special permit violated the TCA based in part on the fact that the TCA requires a speedy resolution of litigation and because all relevant evidence was provided in the planning board's initial public hearing), overruled on jurisdictional grounds, Metheny v. Becker, 352 F.3d 458 (1st Cir. 2003).[26]

### 2. Removal

Removal from state court to federal court is proper where it appears that resolution of the state law claim requires resolution of a federal issue under the TCA. Metheny v. Becker, 352 F.3d 458, 461 (1st Cir. 2003) (ordering district court to remand case back to state court where resolution of state law claim that Zoning Board of Appeals had abused its discretion in issuing variance to construct a wireless telecommunications tower did not necessarily require resolution of federal issue concerning coverage gaps).

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leverage. It also effectively resolves the conflict between the Federal Circuit Courts that predated it. Compare Nextel Partners, Inc. v. Kingston Township, 286 F.3d 687, 694 (3d Cir. 2002) (holding that "the TCA implicitly precludes an action under § 1983 by creating a comprehensive remedial scheme that furnishes private judicial remedies") with Abrams v. City of Rancho Palos Verdes, 354 F.3d 1094 (9th Cir. 2004) (reaching the contrary conclusion).

[26] This is consistent with the practice of federal courts, in resolving TCA appeals, of ordering the issuance of the requested permits on the grounds that such relief best serves the TCA's stated goal of expediting resolution of these types of actions and that remand to the Board would serve no useful purpose. See Town of Amherst, NH v. Omnipoint Communications Enterprises, Inc., 173 F.3d 9 (1st Cir. 1999); Omnipoint Communications MB Operations, LLC, v. Town of Lincoln, 107 F.Supp.2d 108 (D.Mass. 2000); Telecorp Realty, LLC v. Town of Edgartown, 81 F.Supp.2d 257, 261 (D.Mass. 2000); Cellco Partnership v. Town of Douglas, 81 F.Supp.2d 170, 175 (D.Mass. 1999); Sprint Spectrum L.P. v. Town of Easton, 982 F.Supp. 47, 52 (D.Mass. 1997).

The existence of a consent decree or court injunction in a prior federal action concerning the TCA does not alone authorize removal of a state law action challenging a variance for construction of a wireless communications tower issued pursuant to the consent decree or court injunction. Metheny v. Becker, 352 F.3d 458, 460 (1st Cir. 2003) (vacating the district court's judgment dismissing the action on res judicata grounds and remanding to the district court with instructions to remand the matter to state court); Russell's Garden Center v. Nextel Communications of the Mid-Atlantic, Inc., 296 F.Supp.2d 13, 16-17 (D. Mass. 2003) ("Removal, therefore, is improper where the only basis for subject-matter jurisdiction is the preclusive effect of a previous court injunction.").

**3. Preemption**

In federal court, a party cannot challenge, under state law, a permit for a wireless communications tower, which was issued pursuant to a judicial settlement between the carrier and town authorities or under a judgment under the TCA because the TCA preempts such actions. See Brehmer v. Planning Board of the Town of Wellfleet, 238 F.3d 117, 121-22 (1st Cir. 2001) ("Under the TCA, local zoning ordinances … apply only to the extent that they do not interfere with other provisions of the Act" and when a planning board's decision is pursuant to a federal court order "the state law that might ordinarily control such disputes is preempted in this setting"), overruled on jurisdictional grounds, Metheny v. Becker, 352 F.3d 458 (1st Cir. 2003); Patterson v. Omnipoint Communications, Inc., 122 F.Supp.2d 222, 226 (D. Mass. 2000), aff'd, 23 Fed. Appx. 17 (1st Cir. 2001) (challenge under Zoning Act to special permit issued pursuant to federal court order represents impermissible collateral attack and TCA preempts Zoning Act's procedural requirements in that situation); Chief Justice Cushing Highway Corporation v. Limbacher, 145 F.Supp.2d 108, 111 (D. Mass. 2001) (appeal under state zoning act challenging

planning board decision made pursuant to federal court judgment is preempted by the TCA and decision cannot be annulled under local zoning ordinance). But see Russell's Garden Center v. Nextel Communications of the Mid-Atlantic, Inc., 296 F.Supp.2d 13, 16-17 (D. Mass. 2003) (ruling that the plaintiff's state law allegations regarding the procedure by which the local zoning authority issued the permit arising out of the court-ordered permanent injunction are not completely preempted by the TCA but that no federal subject-matter jurisdiction exists in these circumstances).

The State Building Code is not on its face preempted by the TCA and applies to a telecommunications facility which will be built pursuant to a consent decree that found a violation of the TCA and required the Town involved to issue a special permit. See Nextel Communications of the Mid-Atlantic, Inc. v. Town of Hanson, 311 F.Supp.2d 142, 156 (D. Mass. 2004) ("the state Building Code has a place within the TCA scheme so long as its implementation does not amount to effective prohibition of telecommunications service or otherwise violate the Act").

**4. The Makings of a Creative TCA Settlement**

Given this authority, there are two basic types of appeals of local zoning decisions involving wireless communication facilities:

- A TCA appeal by the applicant to federal court from a decision denying the proposed facility; and
- A state law appeal by an "aggrieved" neighbor to state court from a decision approving the proposed facility.

TCA appeals can, should, and very often do settle. Abutter appeals, motivated often by "not in my back yard" concerns are much less susceptible to settlement.

Essential to every TCA settlement is that the carrier gets to build a facility to cover the

target area in question faster and with less transaction costs than the carrier would face by going through litigation. Without this, there is simply no incentive for the carrier to settle. In some cases, the carrier makes some reasonable concessions with respect to the proposed facility in return for which it is allowed to proceed. These concessions may involve a reduction in height, improved screening of the antennas or ground equipment, or other design changes that do not impose undue expense, delay, or reduction in coverage.

In other situations, the carrier has its preferred site; the Town has its preferred site (often a town-owned property that may from its perspective be preferable geographically and that would generate rent revenue for the town); and the question is how to structure a settlement. The procedural dilemma is this: The carrier's preferred site is under a lease agreement, has gone through the public hearing permitting process, has undergone due diligence review such as environmental, NEPA and SHPO reviews, and is in litigation. By contrast, the Town's alternative site is starting from scratch. The solution (assuming that the carrier's lease on the preferred site permits such flexibility and that the alternative site is suitable from a coverage standpoint) is to fashion a settlement agreement that will by court order result in a situation where the carrier ends up with one site or the other, without the need for further permitting processes for either. Here are some suggestions on how to accomplish such a settlement for a case involving the proposed construction of a new tower in a town:

**Consent Judgment**

There needs to be an Agreement for Judgment and a proposed form of Judgment which the Federal Court would enter, pursuant to which it would be ordered, adjudged and declared as follows:

a. **Counts Determined**

The Final Judgment must enter judgment in favor of the carrier on one or more Counts of the TCA Complaint, typically the effective prohibition count.

As the remedy therefor, the Final Judgment must provide that the carrier shall be and is authorized to construct, operate, maintain and use a wireless communication tower and facilities in the Town on the terms set forth in the Judgment.

To promote settlement, no costs and/or attorneys fees would be sought by or awarded to any party.

b. **Relief as to the Town's Preferred Site (The "Carrot")**

The Final Judgment should provide that, upon issuance of a building permit by the Town, the Carrier shall be permitted to construct, operate, maintain and use a wireless communications monopole (of a specific height capable of collocating a specified number of carriers) (the "Tower") and their respective wireless communications facilities within an equipment compound of a specific size at the Town's Preferred Site, along with all necessary antennas, cables, equipment, usable means of access and electric and telephone utilities from a public way to the equipment compound (collectively the "Town's Preferred Tower Facility").

The Final Judgment should provide that the Carrier shall be entitled to the relief set forth in the Judgment as to the Carrier's Preferred Site unless the Town shall make the Town's Preferred Site available to the Carrier as a viable location for the Town's Preferred Tower Facility by undertaking all necessary actions and by fulfilling all applicable requirements under state and local law as set forth below within specified expedited time frames set forth in the Judgment (the "Municipal Requirements"). For example, depending on the situation, the Municipal Requirements may include the following:

1. Town RFP: On or before Date 1, the Town shall issue a Request for Proposals ("RFP") for the lease of a portion of the Town's Preferred Site substantially in the form attached as an Exhibit to the Agreement for Judgment, contingent upon the authorizations by Town Meeting specified below. In the event the Carrier is the successful bidder in response to the RFP, the Town shall on or before Date 2 award the contract to the Carrier and enter into the lease with the Carrier for the Town's Preferred Tower Facility in accordance with the RFP's time limits, contingent upon the authorizations by Town Meeting specified below. In the event the Town fails to so issue the RFP, award the contract to the Carrier, or execute the lease with the Carrier, then the Carrier shall be entitled to the relief set forth in the Judgment with respect to the Carrier's Preferred Site.

2. Surplus Declaration: On or before Date 3, the Town acting by and through the board or officer having charge of the Town's Preferred Site shall designate the preferred location for the Town's Preferred Tower Facility (the "Preferred Lease Location"), and shall issue any necessary notice, opinion and determination under G.L. c. 40 §§ 15 and 15A, to make it available for lease for the Town's Preferred Tower Facility together with all necessary access and utilities from a public way (the "Town's Preferred Tower Facility Lease Area"). In the event the Town fails to so issue any such necessary notice, opinion and determination, then the Carrier shall be entitled to the relief set forth in the Judgment with respect to the Carrier's Preferred Site.

3. Special Town Meeting: As soon as practicable and no later than Date 4, unless otherwise agreed in writing by counsel for the parties, the Town shall hold a Special Town Meeting ("Special Town Meeting"), and shall duly publish and post a warrant containing the following Articles and shall consider the following Articles at the Special Town Meeting:

    (a) an Article substantially in the form attached as an Exhibit to the Agreement for Judgment authorizing (i) the transfer of the Town's Preferred Site from the current custodian to the Board of Selectmen for purposes of entering a long-term lease of a portion thereof for wireless communication purposes, (ii) the long-term lease of a portion of the Town's Preferred Site for wireless communication purposes, (iii) the grant of all necessary easements for electric and telephone utilities to service the Town's Preferred Site for wireless communication purposes, and (iv) any additional Town Meeting approvals necessary for the construction, operation, maintenance and use of the Town's Preferred Tower Facility, including without limitation any approvals necessary to provide the Town with good, clear, record, marketable, unrestricted title to the Town's Preferred Site and all necessary access thereto from a public way for this purpose; and

    (b) after complying with all necessary requirements of G.L. c. 40A, § 5, an Article substantially in the form attached as an Exhibit to the Agreement

for Judgment to rezone the Town's Preferred Site as a Special Planned Wireless District in which the Town's Preferred Tower Facility would be allowed as of right.

4. In the event the Town does not, within 5 calendar days of the opening of the Special Town Meeting, and no later than Date 5, duly adopt by the requisite votes of Town Meeting the Articles referred to above, and duly conclude the Special Town Meeting without reconsideration thereof, then the Carrier shall be entitled to the relief set forth in the Judgment with respect to the Carrier's Preferred Site.

5. Attorney General Approval: In the event the Town adopts the Article to rezone the Town's Preferred Site as a Special Planned Wireless District in which the Town's Preferred Tower Facility would be allowed as of right, the Town shall within five business days after the end of the Special Town Meeting request the approval of this zoning amendment by the Massachusetts Attorney General. In the event the Massachusetts Attorney General disapproves this zoning amendment in whole or in part, then the Carrier shall be entitled to the relief set forth in the Judgment with respect to the Carrier's Preferred Site, unless the portion or portions of the zoning amendment not approved do not inhibit the Carrier' ability to forthwith construct, operate, maintain and use the Town's Preferred Tower Facility on the Town's Preferred Site.

6. DEP Approval: If the Town's Preferred Site is a water supply property, then as soon as practicable and no later than Date 6, the Town shall submit to the Department of Environmental Protection ("DEP") all necessary documentation and take all necessary actions to satisfy DEP's Policy No. DWSP98-01 and DEP Guidance DWSG98-01, which impose certain requirements governing construction of wireless communication facilities on any land under the control of a public water system. In the event that (a) the Town does not do so or (b) DEP disapproves of the use of the Town's Preferred Tower Facility Lease Area and an alternative location on the Town's Preferred Site that would be acceptable to the DEP, the Carrier and the Town can not be identified and fully authorized and approved within 30 days of notice of disapproval by DEP or such other time period as the parties may agree, then the Carrier shall be entitled to the relief set forth in the Judgment with respect to the Carrier's Preferred Site.

7. Building Permit: Within two business days following the end of the Special Town Meeting referred to in 3 above, or within 30 days after the Carrier shall have submitted a building permit application for the Town's Preferred Tower Facility consistent with this Judgment, whichever is later, the Town shall issue a building permit (and any necessary electrical and foundation permits) for the Carrier's Tower Facility on the Town's Preferred Site. In the event the Town does not do so, then the Carrier shall be entitled to the relief set forth in the Judgment with respect to the Carrier's Preferred Site.

8. Other Necessary Actions: On or before Date 7, the Town shall effectuate all other necessary actions and requirements necessary to implement the foregoing. In the event that the Town does not do so, then the Carrier shall be entitled to the relief set forth in the Judgment with respect to the Carrier's Preferred Site.

9. Utility Easements: On or before Date 8, the Town shall duly execute and deliver for recording all necessary easements for electric and telephone utilities to service the Town's Preferred Site for wireless communication purposes. In the event that the Town does not do so, then the Carrier shall be entitled to the relief set forth in the Judgment with respect to the Carrier's Preferred Site.

The Final Judgment should further provide that:

1. Third Party Challenge: The Carrier shall be entitled to the relief set forth in the Judgment with respect to the Carrier's Preferred Site in the event that any lawsuit, appeal, or other administrative or judicial proceeding is commenced by any person or entity seeking to challenge the validity of any of the actions taken pursuant to, with respect to, or resulting from the Municipal Requirements, unless each and every such proceeding is fully and finally resolved in the Carrier's favor within 90 days of the commencement of the proceeding or such other time period as the parties may agree and the Court may approve.

2. BP Deadline: The deadline for the issuance of the building permit for the Carrier's Court-approved Town's Preferred Tower Facility shall not be extended by reason of any lawsuit, appeal, or other administrative or judicial proceeding set forth in the preceding paragraph, unless the parties agree to such extension and jointly move that the Court amend the Judgment to provide for the extension.

3. Agreed Conditions: If the Carrier constructs the Town's Preferred Tower Facility at the Town's Preferred Site, (i) it shall be subject to the conditions attached as an Exhibit to the Agreement for Judgment, and (ii) the Town will be authorized to place, at its expense, one or more emergency antenna(s), e.g., Police and Fire, on the Carrier's monopole as long as the antenna(s) do not interfere with the provision of wireless communications and the location of the antenna(s) is approved by the Carrier, such approval not to be unreasonably withheld.

4. Enforcement: If, upon motion, the Court finds that the Town or Town Meeting has taken or refused to take any vote(s) or other action(s) with the purpose or effect of denying or unduly delaying permission for the Carrier to construct and use the Town's Preferred Site for the purposes stated in the Judgment on the timetable set forth therein, the Carrier shall be entitled to the relief set forth in the Judgment with respect to the Carrier's Preferred Site.

c. **Relief As To the Carrier's Preferred Site (The "Stick")**

The Final Judgment should provide that, if

(a) any of the triggering events set forth in the previous Section occurs,

(b) any court issues an order that enjoins construction, operation, maintenance or use of, or issuance of any permit, approval or contract necessary for the Town's Preferred Tower Facility and such action is not resolved in the favor of the Carrier within the 90 days of the commencement of the proceeding or such other extended period as the parties may agree to and the Court may approve, or

(c) the Town's Preferred Site becomes unavailable (as defined below) to the Carrier,

then the Carrier's requests for relief shall be and by the Judgment are granted with respect to the proposed installation of a wireless communication tower and facilities at the Carrier's Preferred Site as follows:

(1) The Zoning Decision denying zoning relief for the Carrier's proposed tower and facilities shall be and is (a) vacated to the extent it denied zoning relief for Carrier's proposed facilities, and (b) amended and modified to grant all necessary zoning variances and other relief for the proposed facility in accordance with the Carrier's plans as previously filed with the Board and amended during the public hearing process and any construction drawings necessary to effectuate the same (collectively the "Carrier's Preferred Site Plans") and subject to the Conditions set forth in an Exhibit to the parties' Agreement for Judgment;

(2) There is no just cause for delay in the immediate issuance of all other necessary zoning relief for the Carrier's Preferred Site Facility by the Judgment alone, and with no other actions, meetings, hearings or decisions of any Board or official of the Town being necessary; and

(3) The Defendant Town (and all municipal Boards and Officials of the Defendant Town) shall, upon a completed application from the Carrier, within a reasonable time thereafter, not to exceed 21 days, forthwith issue any necessary building permits, foundation permits, and electrical permits for the construction of the Carrier's wireless communications tower and facilities on the proposed Carrier's Preferred Site in accordance with the Judgment, the Carrier's Preferred Site Plans, and the stipulated conditions attached to the parties' Agreement for Judgment.

Unavailability of Town's Preferred Site:

The Final Judgment should provide that the Town's Preferred Site alternative shall be considered "unavailable" for the Court-approved wireless communication tower and facilities, and the Carrier shall be entitled to the relief set forth in the Judgment for the Carrier's Preferred Site, if any factor beyond the reasonable control of the Carrier does or will:

(a) prohibit or delay by more than three months the building permit for the Town's Preferred Tower Facility;

(b) escalate by more than 20% the construction cost of the Town's Preferred Tower Facility compared to its anticipated construction cost as of the date of the Judgment;

Such factors triggering unavailability of the Town's Preferred Site may include, without limitation:

(1) any denial of a governmental permit, approval, order, or finding required for the construction and operation of the wireless communication tower and facilities or any imposition of conditions that result in an effective denial;

(2) any finding of adverse effect on historical or archaeological resources at or in the vicinity of the Town's Preferred Site by the Massachusetts Historical Commission, which finding cannot be mitigated at reasonable cost within 30 days;

(3) any appeal (or any intervention in any appeal) by any person or entity of any governmental permit, approval, order, finding or judgment related to the wireless communication tower and facilities, unless fully and finally resolved in the Carrier's favor within 90 days of the commencement of the proceeding or such other time period as the parties may agree to and the Court may approve;

(4) the presence of any threatened or endangered species, wildlife habitat, vernal pool, perennial stream, or other environmental condition at or near the Town's Preferred Site which presents a material obstacle to construction of the facilities, which obstacle cannot be mitigated at reasonable cost within 30 days;

(5) any objective material breach of the Lease Agreement for the Town's Preferred Site by the Town;

(6) the inability on reasonable terms to bring necessary telephone and electric utilities to the proposed location of the Town's Preferred Tower Facility;

(7) radio frequency problem(s) not otherwise identified in any crane test performed in connection with the Agreement for Judgment or site acquisition problem(s), constructability problem(s), and legal problem(s) not reasonably known at the time the parties execute the Agreement for Judgment; or

(8) any other impediment rendering the Town's Preferred Site infeasible for the Carrier's wireless telecommunications purposes.

The Final Judgment should provide that, in the event the Carrier determines that the Town's Preferred Site alternative is unavailable as defined above, and it is necessary to construct the wireless communication tower and facilities at the Carrier's Preferred Site, the Carrier shall so notify the Town Counsel in the litigation in writing of the reasons therefor (the "Notice of Unavailability"). If a defendant wishes to contest the infeasibility or unavailability determination in any such notification (whenever sent), it shall inform the Plaintiff(s) in writing within 21 days of receipt of the Notice of Unavailability, in which case the parties shall submit their dispute to the court for decision.

The Final Judgment should provide that, upon receipt of the Notice of Unavailability, the Defendant Town (and all municipal Boards and Officials of the Defendant Town) shall, upon application therefor, forthwith issue any necessary building permit(s), foundation permit(s) and electrical permit(s) for the construction of the Carrier's wireless communications tower and facilities at the Carrier's Preferred Site in accordance with the Judgment, the Plans, and the Conditions set forth in an Exhibit to the parties' Agreement for Judgment with the understanding by all parties that such building permit shall become null and void in the event that, (a) the Town has, at its expense, fully and finally resolved to the Carrier's reasonable satisfaction all issues identified in the Notice of Unavailability within 30 days after submission of a building permit

application for construction of the Carrier's Tower Facility at the Carrier's Preferred Site, or such other time period as the parties may agree.

The Final Judgment should provide that, in the event construction, operation, maintenance and use of the Carrier's Preferred Site Facility proceeds pursuant to this Judgment, then (a) any building permit previously issued for the Town's Preferred Facility shall be null and void, (b) any lease agreement for the Town's Preferred Facility shall be null and void, (c) any easement granted to the Carrier with respect to the Town's Preferred Site shall be null and void and if such easement was previously recorded at the Registry of Deeds, appropriate documentation will be recorded to indicate same, (d) the Carrier shall remove from the Town's Preferred Site any above-ground improvements installed by them and restore the Town's Preferred Site substantially to its condition at the commencement of their construction, and (e) the Carrier shall not be required to remove from the Town's Preferred Site any below ground foundations or underground utilities installed by of for the Carrier.

## CONCLUSION

Given the competitive landscape underlying the wireless industry as it has evolved over time, the TCA's four main requirements favoring carriers, the trend of judicial decisions, and the issues facing carriers and municipalities as they continue to interact over this important and increasingly vital communications medium, creativity and cooperation can lead to better, faster, and more cost-effective siting solutions mutually agreeable to carriers and towns alike.

TCA_Decisions\TCA Legal Points